

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Docket No. 02-278

)  
In the matter of )  
Rules and Regulations Implementing )  
the Telephone Consumer Protection Act )  
of 1991 )  
)

**OPPOSITION TO PETITION FOR RECONSIDERATION  
FILED BY THE OFFICE OF ADVOCACY, U.S. SMALL  
BUSINESS ADMINISTRATION**

Walter Oney,<sup>1</sup> an individual and the sole proprietor of a “small business” as that term is defined in 5 U.S.C. § 601(3), respectfully submits this opposition to the Petition for Reconsideration (the Petition) filed in this proceeding on August 25, 2003, by the Office of Advocacy of the Small Business Administration (Advocacy).

**ARGUMENT**

**A. The petition should be denied because it does not  
reflect the needs and desires of Advocacy’s statutory  
constituency.**

Advocacy purports to act on behalf of small entities generally, including small businesses, small trade associations, and small non-profit organizations. It derives its authority from sections 601 *et seq.* of Title 5. According to law, Advocacy’s first duty with respect to rules promulgated by agencies like the Commission is

not later than 15 days after the date of receipt of the materials described in paragraph (1), [to] identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule.

5 U.S.C. § 609(b)(2).

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<sup>1</sup> Doing business as Walter Oney Software and as Walter Oney, Attorney at Law.

Advocacy's petition does not indicate whether or how it fulfilled its duty to identify small entities affected by the rules it seeks to overturn. A contemporaneous press release recites, however, that the petition was filed because of "the concerns of small business trade associations, membership organizations, and non-profits."<sup>2</sup> This recitation makes patent what would otherwise have to be inferred from the tenor of the arguments that Advocacy makes in its petition, namely that it considered the viewpoint of only one set of the small entities it is charged with protecting.

I believe that the impact of junk faxes falls disproportionately on small entities, particularly businesses that are based in homes, and that Advocacy utterly failed to take that impact into account. According to the SBA's own administrator, 27 million people in America work full-time or part-time from home.<sup>3</sup> "[H]ome-based businesses represent 52 percent of all firms and provide 11 percent (\$314 billion) of the total receipts of the economy."<sup>4</sup> A petition based solely on the impact on trade associations, membership organizations, and non-profits is therefore woefully unrepresentative of Advocacy's real constituency.

Unsolicited fax advertising harms small entities disproportionately in many ways. I suggest that home-based businesses are more likely than large entities to make a voice phone line do double duty for data and fax applications. Receiving a fax necessarily prevents the line from being used for data or voice. Without special switching equipment, a subscriber who is not expecting a fax will be greeted by a piercing tone upon answering a fax call.

Small businesses are also more likely than large entities to rely on fax modem boards in personal computers in preference to dedicated fax machines. Receiving a fax, and rendering it into a viewable image, requires significant processing power that can interfere with other work.

Home fax machines may be located in areas where incoming call alarms, or even the noise of paper feeding through the machine, is intrusive.

Since small entities receive fewer faxes than large ones, the cost of receiving unwanted facsimile advertisements is a higher fraction of the total cost of owning and operating a fax machine than would be the case for a large business.

Not only does Advocacy's petition not deal with these disproportionate burdens, but it also disingenuously and incorrectly accuses the Commission of not having adequately considered the impact of fax advertising on small entities while formulating revisions to the TCPA rules earlier this year. The Commission is surely able to defend itself against these unfounded criticisms, but I find the following points worthy of note:

- The Commission noted comments from small- and home-based business persons *and* from the industry groups that, Advocacy says, were ignored.<sup>5</sup>

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<sup>2</sup> [http://www.sba.gov/advo/laws/comments/factsfcc03\\_0825.pdf](http://www.sba.gov/advo/laws/comments/factsfcc03_0825.pdf)

<sup>3</sup> <http://www.sba.gov/sbasolutions/OAMessage.html>

<sup>4</sup> *Id.*

<sup>5</sup> *In re Rules and Regulations Implementing the [TCPA]*, Rule and Order ¶ 186 (FCC 03-153, June 26, 2003) (hereinafter cited as 2003 Order).

- Despite what Advocacy says, the Commission *did* consider the effect of eliminating the EBR exemption on industry proponents of the exemption.<sup>6</sup>
- The Commission found as a fact that “consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive.”<sup>7</sup> This finding, based on substantial evidence in the record, should not be open to review.
- The Commission has had ample experience trying to decide EBR claims on a case-by-case basis and is in a far better position than Advocacy to judge whether the EBR test is workable.
- The Commission explicitly balanced the wishes of advertisers with the privacy rights of recipients and found that “the interest in protecting those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the interests of companies that wish to advertise by fax.”<sup>8</sup> Advocacy’s quarrel seems to be that, based on the one side of the debate it has actually weighed, it doesn’t like the Commission’s reading of the scale.

## **B. Advocacy overstates the burden of compliance with the written-permission rule.**

Advocacy’s petition greatly overstates the burden of complying with a rule requiring written permission prior to sending facsimile advertisements. The heart of its argument is contained in three conclusory paragraphs in section II.B.1 of its petition.

Advocacy presupposes that “all 22.4 million” small businesses potentially wish to advertise by facsimile. I submit that very few small businesses will actually wish to do so—and thank heaven. If all of those businesses were to send me one fax, and if I could notify one of them each minute that I didn’t want to receive a second one, it would take me roughly 42 years of nonstop effort, without sleep or meals, to finish the job. But of course, it takes much longer than a minute to find out who’s hiding behind an anonymous toll-free number, and they don’t stop no matter how nicely or rudely you ask.

Personally, I have *never* wished to send an unsolicited advertisement to anyone. I frequently exchange correspondence with clients and with persons who contact me via e-mail or otherwise with a view towards establishing a business relationship with me. Sometimes these contacts result from direct mail; more often, they result from my general reputation or after a visit to my professional web sites. I often inform students who have registered for one of my seminars about course details by fax. I often send copies of charge receipts, invoices, technical proposals, and contracts by fax.

I believe that the direct marketing industry is fanning hysteria to suggest that fax communications in these situations will suddenly become illegal under the TCPA or will result in a flood of lawsuits. In practically any case when I send a fax, it *concerns* goods

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<sup>6</sup> *Id.* ¶ 188.

<sup>7</sup> *Id.* ¶ 189.

<sup>8</sup> *Id.* ¶ 191.

or services that are commercially available. I am utterly confident that no court would ever find it to be *advertising*, however.

Advocacy can perhaps be forgiven a bit of hyperbole when it suggests that a small business might need a room full of filing cabinets to keep track of permission records. Conservative calculations suggest that such a room could comfortably hold over a million pieces of paper.<sup>9</sup> An entity that contemplates sending so many faxes is not “small”. In fact, it’s likely to be one of the scofflaw fax broadcasters that are responsible for most of the abuse of facsimile advertising. In any event, the clerical burden for keeping track of a company-specific opt-out database would be at least as large as to keep track of an opt-in database.

Advocacy recites a set of six steps that, it says, create a substantial burden of compliance. Quite apart from the fact that Advocacy doesn’t offer any data—experimental, experiential, or even existential—to justify its quantification, there are many flaws in its argument. The first flaw is the assumption is that the procedural steps involved in requesting and handling permission forms will be anything but trivial. Developing a policy (“We’re going to send unsolicited fax advertisements only to those people who’ve given us written permission”) and drafting a permission form (“You can send us unsolicited fax advertisements”) need not require more than fleeting thought. It is simply not true that permission requests must be sent to “all customers, potential customers, and business partners.” Permission need not be requested if the company plans not to advertise by fax. And asking permission of *potential* customers is exactly what Congress intended to happen when it forbade the sending of *unsolicited* facsimile advertisements. The burden of receiving, filing, and storing permission forms is proportional to the number of people who respond. Since, I believe, most people *do not want to receive faxed advertisements*, that number is likely to be very small.

But the major flaw in Advocacy’s argument is that it fails to balance the burden of permission tracking against the burden of receiving unwanted faxes. On the sending side of the equation, we have the six steps that Advocacy outlines for each potential target of ads. There are more steps on the receiving side, and many of them occur each time a fax arrives rather than each time the recipient forms a relationship with a fax sender. The recipient needs to (1) make sure the fax machine is always connected to power and a telephone line, (2) make sure the fax machine is always stocked with paper and ink (which costs more per ounce than the finest perfumes), (3) depending on where the fax machine is located, tolerate interruptions when the incoming fax alarm sounds, (4) if using a fax modem, halt current operations on the computer while the time-consuming process of receiving a fax and rendering it into an image occurs, (5) if sharing a phone line for voice and data, temporarily halt voice communications while each fax arrives, (6) deal with any automatic notification that may get sent to the recipient’s cell phone, (7) periodically empty the in-basket, (8) identify those faxes that are unwanted, (9) possibly attempt to request that no more faxes be sent from a given sender, and (10) dispose of the fax.

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<sup>9</sup> A 15’ by 24’ room could be filled with up to 32 standard-sized filing cabinets placed back to back with a three-foot aisle. Each drawer could hold 7500 one-page documents. Thirty-two 5-drawer cabinets could therefore hold 1.2 million permissions.

## C. Advocacy's petition exaggerates and misstates material facts

Advocacy requests several changes in the TCPA rules.<sup>10</sup> I submit that all of these proposed changes would unfairly favor advertisers at the expense of small businesses forced to pay to receive unwanted ads.

Advocacy suggests first that the EBR exemption be reinstated. Leaving aside the question whether the TCPA even authorized the Commission to create the EBR exemption in the first place, Advocacy's arguments are unsound.

- It says, "Many small businesses use faxes to communicate with . . . potential customers." In fact, very few businesses engage in advertising via fax. The ones that do, in my experience, are generally ones that operate on the fringe of ethical and legal business practices.
- It says, "[Customers, potential customers, and business partners] expect to receive fax communications." Potential customers surely do *not* expect to receive fax communications unless they have previously given their consent. Existing customers and business partners may well expect to receive fax communications, but the evidence already before the Commission strongly suggests that they do not expect to receive *advertising* communications.
- It says, "[T]he permission form is an unnecessary legal hoop." The Commission expressly considered the rights of advertisers vis-à-vis the rights of fax machine owners and concluded that the permission form *is* necessary. Using an emotionally loaded pejorative like "legal hoop" doesn't change the balance.
- It says, "[S]mall businesses can more readily communicate with [persons] who desire this information." *Which* information? And more readily than what? Given today's technology, e-mail and web postings are quicker and cheaper than fax, *and they are perfectly legal*.
- It says that reinstating the EBR exemption will make it easier for small businesses to comply with the rule because it will make fax advertising more similar to voice telemarketing. Congress specifically distinguished between automated telemarketing, including fax, and voice telemarketing in the TCPA.<sup>11</sup> The Commission doesn't have the authority to regulate away that distinction.

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<sup>10</sup> Advocacy couches these requests as alternative rules that, it says, the Commission improperly failed to consider. A fair reading of the history of the recently concluded round of rulemaking is that Advocacy simply failed to timely file its comments. I submit that it is only now, and belatedly, bringing these suggestions forward because of pressure from special interests, including the direct marketing industry.

<sup>11</sup> The distinction is an intended artifact of the fact that several different bills were combined into what is now 47 U.S.C. § 227. The so-called Automated Telephone Consumer Protection Act introduced in the 102d Congress regulated automatic dialing equipment, prerecorded announcements, and facsimile advertising. The bill's sponsor referred to these particular evils as "telephone terrorism". 137 Cong. Rec. 30821 (102d Cong., 1st Sess., Nov. 7, 1991) (remarks of Sen. Hollings).

Additionally, fax and voice telemarketing is similar only to a mass marketer; they have very different impacts on recipients.

The second change requested by Advocacy relates to membership in an organization. Membership, it suggests, should operate as consent to receive unsolicited commercial faxes from the organization.

- It says, “Membership organizations rely upon faxes to communicate.” Where’s the evidence of this supposed fact? Organizations use a variety of means to communicate, including newsletters and other publications, announcements posted at gatherings, web postings, and e-mail.
- It says that gathering permission forms is time-consuming and expensive. Again, where’s the evidence of this? Getting written permission from *new* members adds no expense whatever to the initial enrollment process. Signing up old members can likewise be done at no expense as part of a renewal process. And the organization can simply refrain from fax advertising to persons who haven’t yet given permission. Furthermore, under suitable definitions of what constitutes a signed writing, an e-mail or a completed web form could satisfy the requirement for written consent.
- It says, “[M]embers of a membership organization expect to receive fax communications.” Where’s the evidence of this supposed fact? I belong to many organizations. I emphatically do *not* expect to receive fax advertisements from any of them, and I resent the ones that I do receive.

Advocacy also suggests reinstating “the exemption for non-profit organizations.” I confess to missing something in the Commission’s June 26 Rule and Order. I do not see how the rule changes promulgated earlier this year changed the law so as to forbid the transmission of noncommercial messages by fax. In fact, the Commission very clearly stated that it was *not* changing the rules with respect to tax-exempt non-profit organizations.<sup>12</sup> To suggest otherwise is alarmist. In any case, Advocacy once again makes the unproved assertion that “contributors and associates of non-profit organizations expect to receive faxes.” I contribute to many such organizations, and I do *not* expect to receive faxes from them.

Finally, Advocacy demands clarification of what constitutes an “advertisement”. It asks a number of rhetorical questions, the tendency of which is to alarm the reader into thinking that something so innocent as a company name on a fax cover sheet might somehow be an illegal advertisement. The answer to these questions is simple: let courts and the Commission itself decide whether a given document is an advertisement or not. If the history of fax broadcasting by entities like fax.com teaches any lesson, it is that any rigid safe harbor will be abused by the direct marketing industry. It is far better to err on the side of protecting recipients than on the side of senders.

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<sup>12</sup> 2003 Order ¶ 128. Perhaps Advocacy is confused by the fact the Federal Trade Commission’s Telemarketing Sales Rule currently applies in part to charitable solicitations. In particular, and until the FTC and FCC rules are completely harmonized in this area, interstate charitable solicitors would seem to have to honor a company-specific do-not-call request. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A). A for-profit telemarketer would also have to avoid calling numbers registered on the national do-not-call list. *See id.* § 310.4(b)(1)(iii)(B).

## CONCLUSION

I respectfully request that the Commission dismiss Advocacy's Petition for Reconsideration.

Dated: Sept. 5, 2003

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## CERTIFICATE OF SERVICE

I certify under the pains and penalties of perjury that I served a copy of the within **OPPOSITION TO PETITION FOR RECONSIDERATION FILED BY THE OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION** by mailing the same, postage prepaid, by first class mail to:

Eric E. Menge, Esq.  
Office of Advocacy  
U.S. Small Business Administration  
409 Third St. S.W.  
Washington, DC 20416

Dated: Sept. 5, 2003

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Walter Oney